

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Service Electric Cablevision	)	
	)	
Petition for Stay of Section 76.101 of the	)	<b>File No.</b> _____
Commission's Rules	)	

To: Office of the Secretary, FCC

**Petition for Stay of Section 76.101 of the Commission's Rules**

Pursuant to Sections 1.41 and 1.44(e) of the Commission's rules, Service Electric Cablevision ("Service Electric") petitions the Commission for stay of Section 76.101 of the Commission's syndicated exclusivity rules pending the Commission's findings on Service Electric's simultaneously filed *Petition for Special Relief Requesting Waiver of Section 76.101 of the Commission's Rules* ("Waiver Petition"). Absent a grant of stay while the Commission considers Service Electric's *Waiver Petition*, Service Electric will be in violation of Section 76.105(b) of the Commission's rules requiring cable operators to provide syndicated exclusivity protection within sixty days of receiving notice from a broadcaster of syndicated exclusivity rights while seeking for waiver of the rules.

## DISCUSSION

On September 19, 2013, New Age Media notified Service Electric in writing that it was asserting program exclusivity rights on behalf of WOLF TV for two syndicated programs – Dr. Phil and The Doctors (“Notice”).<sup>1</sup> The Syndicated Exclusivity Notice indicated that Service Electric had recently added WFMZ to its Hazleton channel lineup and that WFMZ aired the syndicated programs over which WOLF claimed exclusivity rights.<sup>2</sup> Accordingly, the Notice requested that Service Electric blackout the programming in question.<sup>3</sup>

Section 76.105(b) of the syndicated exclusivity rules requires cable operators to provide syndicated exclusivity protection on the later of the date specified in the notice to the cable operator or the first day of the week that begins sixty (“60”) days after receipt of a notice.<sup>4</sup> Since Service Electric received the Notice on September 19, 2013, Service Electric is required, absent a waiver of the rules, to provide syndicated exclusivity protection starting on November 18, 2013. Two matters make the stay imperative. First, it is highly unlikely that the FCC will be able to rule upon the *Waiver Petition* prior to November 18, 2013.<sup>5</sup> Second, Service Electric cannot reconfigure its system in the manner necessary to accommodate WOLF’s request in the time allotted.<sup>6</sup> Accordingly, without the issuance of a stay, Service Electric will be in violation of the syndicated exclusivity rules while its *Waiver Petition* remains pending before the Commission.

Service Electric is entitled to a stay consistent with the Commission’s four-part test because: (1) the Waiver Petition is likely to prevail on the merits; (2) the petitioner will suffer

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<sup>1</sup> See *Email from Linda Greenwald to Donald Brandt and Tim Trently*, dated September 19, 2013 attached hereto as Exhibit 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 47 CFR §76.105(b).

<sup>5</sup> The *Waiver Petition* was filed on November 15, 2013. The pleading cycle will not close until November 30, 2013, at the very earliest.

<sup>6</sup> See Declaration of Don Brandt at 14 attached as Exhibit 2 (“Brandt Declaration”). It would also be grossly unfair to require Service Electric to either blackout WFMZ throughout its entire system or reconfigure the system prior to Commission action, if as past policy suggests, the Commission ultimately grants the Waiver Petition.

irreparable harm absent the stay; (3) other interested parties will not be harmed by issuance of the stay; and (4) grant of the stay is in the public interest.<sup>7</sup> Service Electric's petition satisfies this four-part test.

The *Waiver Petition* filed with this stay request is likely to prevail on the merits due both to past Commission policy and to the inequity that would otherwise be suffered by Service Electric and its subscribers in order to blackout programming to less than 5% of subscribers served by the cable operator's Hazleton cable system. In past situations, the Commission has recognized this and granted appropriate relief.<sup>8</sup> The small population of affected subscribers represents a *de minimus* portion of the Hazleton system. Only four of the thirty-nine communities in the Hazleton cable system are subject to blackout requirements and each of the four communities has less than 1,000 subscribers, representing only 4.8% of the entire Hazleton cable system.<sup>9</sup>

The cost Service Electric would have to expend to reconfigure its cable system in order to deliver a separate channel lineup to the *de minimus* number of subscribers in the affected communities would significantly outweigh any benefit that WOLF obtains from enforcement of the rules. The cost for Service Electric to reconfigure its technically-integrated system is so great that Service Electric will have little choice but to black out WFMZ from its system entirely rather than reconfigure the system. Commission precedent recognizes that a failure to waive the

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<sup>7</sup> See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1985).

<sup>8</sup> *Continental Cablevision of Ohio*, 7 FCC Rcd 499 at ¶7 (1992); *Missouri Valley Communications*, 58 FCC 2d 1101 (1976); *Sabre Cablevision Co. Inc.*, 33 RR 2d 748 (1975).

<sup>9</sup> *Waiver Petition* at 3-4; see also Brant Declaration at 4-7.

syndicated exclusivity rules in a *de minimus* case provides protection to a few at the expense of many.<sup>10</sup>

Unless the rules are stayed pending Commission review of the Waiver Petition, Service Electric will suffer irreparable harm. If a stay is not granted, then on November 18, 2013 Service Electric will be in violation of the Commission's rules, as the rules require that Service Electric provide syndicated exclusivity protection within sixty ("60") days of receiving notice of the exercise of syndicated exclusivity rights.<sup>11</sup> Service Electric cannot physically comply with the blackout request prior to November 18, 2013, unless it blacks out WFMZ entirely from its integrated system.<sup>12</sup> On November 18, 2013, Service Electric will either have to violate the rules or deprive all of its subscribers in the Hazleton cable system of WFMZ programming.

As described more fully in the *Waiver* Petition, the current configuration of the system does not physically permit Service Electric to black out programs only in the communities outside of WFMZ's Grade B contour. Service Electric must therefore, either delete the programs throughout the entire system, send the requested programs throughout the system or delete WFMZ in its entirety. If Service Electric deletes the requested programs from the communities that are entitled to receive WFMZ unedited, then it would be violating Commission precedent, Commission rules, and the Copyright Act.

Section 76.62(a) of the FCC's rules prohibits the alteration of any broadcast station carried by a cable television system, unless that alteration is required by the rules (*e.g.* Network non-duplication, syndicated exclusivity or sports blackouts). The Commission has held that a

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<sup>10</sup> *Continental Cablevision of Ohio, Inc.*, 7 FCC Rcd 499 at ¶6 (1992) (citing *Report and Order in Gen. Docket No. 87-24*, 3 FCC Rcd 5299, 5339, .243 (1988), *aff'd in part and modified in part*, 4 FCC Rcd 2711 (1989), *aff'd sub nom. United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989); see also, *Sabre Cablevision Co., Inc.*, 33 RR 2d 748 at ¶5 (1975) (finding 5.8% of affected homes to be *de minimus*).

<sup>11</sup> 47 CFR §76.105(b).

<sup>12</sup> Even if Service Electric could afford to reconfigure the system, which it cannot, such major system redesign and reconstruction cannot physically be achieved in the time allotted.

cable operator may not blackout programming on the part of a system that is entitled to view the programming in order to accommodate the blackout rights on other parts of the system.<sup>13</sup>

Section 111 (b)(3) of the Copyright Act provides in pertinent part:

(b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a performance or display of a work embodied in a primary transmission is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided*, however, That such secondary transmission is not actionable as an act of infringement if—

- (1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and
- (2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and
- (3) **the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.**<sup>14</sup>

Accordingly, absent a stay and grant of the requested waiver, Service Electric would be left with removing the signal of WFMZ entirely from the system.<sup>15</sup>

If Service Electric has to drop WFMZ, pending Commission review of the Waiver Petition, it will cause irreparable harm to Service Electric. As the Commission knows from the various analyses it has conducted after retransmission consent disputes and in the review of program access complaints, once a subscriber is lost it is very difficult to recapture that subscriber. WFMZ provides local news, sports and entertainment programming which are vital

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<sup>13</sup> See *In the Matter of: CTV of Derry, Inc. Petition for Special Relief*, 18 FCC Rcd 19272 at ¶8 (2003).

<sup>14</sup> 17 USC §111(b)(3). Emphasis supplied. One of the consequences if a cable system alters a broadcast signal without authority is that the cable operator could lose its right to the statutory license which permits carriage of broadcast signals. See 17 USC §510 (b).

<sup>15</sup> The Commission does not have the authority to waive a statutory restriction. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“[T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes.”).

to Service Electric's customers. A sampling of WFMZ's recent news stories included on the station's website shows the extent of coverage over areas located in the Hazleton system.<sup>16</sup> The website lists six recent news stories regarding incidents in Schuylkill County where the majority of the communities in the Hazleton system are located, including reports of vandalism and traffic incidents.<sup>17</sup> The focus on events in Schuylkill County is not surprising since most of the subscribers in the Hazleton cable system are located less than fifty miles from Allentown, PA – WFMZ's community of license – so local programming from Allentown is relevant to those subscriber's lives. If Service Electric has to drop WFMZ, its subscribers will go elsewhere, and once gone they will be very difficult to get back.<sup>18</sup>

The loss of syndicated exclusivity for two programs will not cause any harm to WOLF due to the *de minimus* number of subscribers affected -- less than 1,000 subscribers per community representing only 4.8% of the system. Commission precedent recognizes that waiving syndicated exclusivity protection for a *de minimus* number of subscribers poses no threat to local broadcasters.<sup>19</sup> Here, providing exclusivity for two programs to less than 5% of the subscribers in the Hazleton cable system would not have an effect on WOLF.

The strongest reasons for granting the stay request are the rights of the public. If the stay is not granted, then Service Electric's subscribers, pending the Commission's review of the Waiver Petition, will lose access to WFMZ programming. The subject service area is entering into the winter storm season. Weather, traffic, school closings, and emergency information from WFMZ may well be life-saving. WFMZ is an important source of local programming for the

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<sup>16</sup> See *WFMZ Poconos/Coal Region News*, available at <http://www.wfmz.com/news/Regional-Poconos-Coal-/149546/-/ndvjfd/-/index.html>, last viewed November 13, 2013, attached as Exhibit 3.

<sup>17</sup> *Id.*

<sup>18</sup> Brandt Declaration at 15.

<sup>19</sup> See *Continental*, 7 FCC Rcd at ¶7.

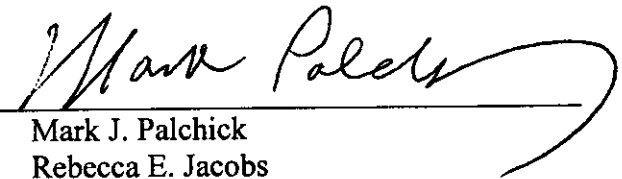
Hazleton subscribers.<sup>20</sup> Providing Service Electric with a stay of the rules will ensure that Service Electric's subscribers are not affected during the pendency of the Commission's review of the *Waiver Petition*. As determined previously by the Commission, failure to waive the rules in a case involving a *de minimus* population of subscribers "provide[s] protection to only a few hundred viewers at the expense of thousands not barred from receiving the programming in question."<sup>21</sup> The public interest clearly weighs in favor of protecting against that reality.

### CONCLUSION

In view of the foregoing, Service Electric urges the Commission to stay the syndicated exclusivity rules during the pendency of the *Waiver Petition*.

Respectfully submitted,

Service Electric Cablevision

By:   
Mark J. Palchick  
Rebecca E. Jacobs

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November 15, 2013

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<sup>20</sup> Brandt Declaration at 16.

<sup>21</sup> See *Continental*, 7 FCC Rcd at ¶7.

## **Exhibit 1**



**From:** Linda Greenwald [<mailto:lgreenwald@fox56.com>]  
**Sent:** Thursday, September 19, 2013 9:45 AM  
**To:** Donald Brandt; Tim Trently  
**Cc:** Jon Cadman; Mike Yanuzzi  
**Subject:** Syndex

Hi Don and Tim –

Hope this e-mail finds you both well. It has been brought to my attention that your cable head-end in Hazleton has recently added WFMZ to the channel line-up. As you know, we have exclusivity on several programs for the Scranton/Wilkes-Barre market and WFMZ airs two of these programs (Dr. Phil and The Doctors). I am referencing and attaching the original syndex letter that was sent to your attention in November of 2012 that highlights these programs. Can you please confirm that you will begin to black out these two programs effective immediately? I have also attached a schedule for WFMZ so that you can see where the programs air which is 8-9pm (Dr. Phil) and 9-10pm (The Doctors) weekdays. I appreciate your attention to this matter and can be reached via phone or e-mail should you require additional information or have any questions. Thanks in advance!

Linda Greenwald  
Corporate Program Director | New Age Media  
1181 Highway 315 | Plains, PA | 18702  
570.970.5615 (O) | 570.970.5652 (F)  
[lgreenwald@fox56.com](mailto:lgreenwald@fox56.com)

## **Exhibit 2**

## **DECLARATION OF DON BRANDT**

I, Don Brandt, declare the following:

1. I am the Director of Programming for Service Electric Cablevision ("Service Electric").
2. The Hazleton cable system is a technically integrated system that is served off of the Hazleton headend.
3. Due to the age and configuration of the Hazleton system, Service Electric cannot blackout programming only in the communities that lie outside of WFMZ's Grade B contour.
4. The Hazleton cable system consists of thirty-nine communities: Ashland, Barry, Beaver Meadows, Blythe, Butler, Conyngham, Delano, Dorrance, East Brunswick, East Cameron, East Norwegian, East Union, Foster, Frackville, Freeland, Gilberton Borough, Girardville, Gordon, Hazle, Hazleton, Jeddo, Kline, Mahanoy Township, Mcadoo, New Castle, New Ringgold, Norwegian, Ringtown Borough, Rush, Ryan, Schuylkill, Shenandoah, St. Clair, Sugarloaf, Tamaqua, Union, Union Township, West Hazleton and West Mahanoy.
5. The Hazleton cable system had a total of 25,042 subscribers as of September 2013.
6. Of the thirty-nine communities in the Hazleton system, four lie outside of WFMZ's Grade B contour – Ashland, Barry, East Cameron and Gordon ("Affected Communities").
7. Each of the Affected Communities has under 1,000 subscribers. Specifically, as of September 2013, Ashland had 786 subscribers, Barry had 191 subscribers, East Cameron had 15 subscribers and Gordon had 216 subscribers.
8. All of the signals in the Hazleton system originate from the Hazleton headend and are transported to a consolidated distribution point.
9. From the consolidated distribution point the channel lineup is transported out through four separate hub sites, Tamaqua, Frackville, Ashland, and Mahanoy.
10. Because the system serves a number of small communities and is located in a rural area, each of the four hub sites is used to distribute signals out to nodes within the system.
11. Many of the system nodes extend beyond town borders to serve multiple communities.
12. In order to send a separate channel lineup to the Affected Communities, Service Electric would need to modify the existing plant, segregate the nodes by geographic area and create separate statistical multiplexing.
13. The cost to redesign the plan would amount to over \$100,000.

14. Service Electric cannot reconfigure its system to blackout the programming of WFMZ in the Affected Communities prior to November 18, 2013, as required by Section 76.105(b) of the syndicated exclusivity rules.
15. If Service Electric drops WFMZ it risks losing subscribers who would be very difficult to get back.
16. WFMZ is an important source of local programming for the Hazleton system subscribers.
17. I have reviewed the Petition for Special Relief Requesting Waiver of Section 76.101 of the Commission's Rules and the Petition for Stay of Section 76.101 of the Commission's Rules and believe them to accurately convey the facts as presented.

To the best of my knowledge, I state under penalty of perjury that the pleading and the foregoing are true and correct.

November 15, 2013

A handwritten signature in dark ink, appearing to read "Don Brandt", with a long horizontal flourish extending to the right.

Don Brandt  
Director of Programming  
Service Electric Cablevision

## **Exhibit 3**



"These are my daily realities!"



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Drivers had to find a different way through a Carbon County community Monday morning after a truck hit a house.

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 10:48 AM Nov 12

**Pocono community grieves after death of high school student**  
 08:27 PM Nov 11

**State police seek Douglas Rappa of Gilbert**  
 06:01 PM Nov 11

**Fire in Monroe County proves fatal for 54-year-old man**  
 02:26 PM Nov 11

**Truck veers off road, hits house and pole**  
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**Schuylkill County church damaged by copper thieves forced to cancel Sunday services**  
 11:13 AM Nov 11

**4 hurt in 2-car Schuylkill Co. accident**  
 09:45 AM Nov 11

**Police investigate rash of tire slashings in Schuylkill County**  
 03:45 PM Nov 10

**Pocono Mountain East High School mourns death of football player**  
 02:40 PM Nov 10

**Tamaqua church robbed of copper piping, food**  
 07:18 PM Nov 08

**Texas man in court in 1968 killing of Bethlehem Steel worker**  
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**3 men charged in abduction of girls in Pottsville**  
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**Big Ticket - Pleasant Valley at Whitehall**

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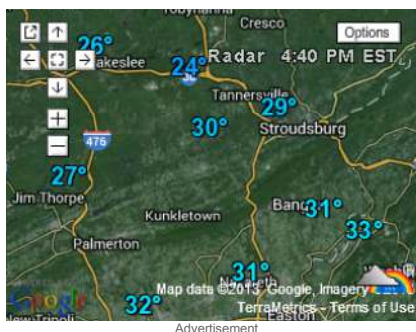
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**Tamaqua church robbed of copper piping, food**

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## CERTIFICATE OF SERVICE

I, Maureen Murphy, hereby declare that a copy of the foregoing request for review and waiver was sent via U.S. mail, this day, November 15, 2013, to the following, as required by section 76.7(a)(3) of the Commission's rules:

President and General Manager  
WFMZ TV  
300 East Rock Road  
Allentown, PA 18103-7519

Ms. Linda Greenwald  
Corporate Program Director  
New Age Media  
1181 Highway 315  
Plains, PA 18702

  
Maureen Murphy